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AUTHOR McGarry, Barbara D.
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ABSTRACT

The author looks at the U.S. Supreme Court ruling on the Rowley case which addresses the implementation of the "Education for All Handicapped Children Act" (P.L. 94-142), particularly the issue of how much special assistance a public school district must make available to a handicapped student. The facts of the case are briefly reviewed from the entrance of the deaf first grader into the public school system to the Supreme Court hearing. The specific wording of the Court's decision is excerpted and discussed. The interpretation of limited congressional intent in P.L. 94-142 and other laws for the education of handicapped children is seen to stem from the status of the national economy. (SW)

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THE ROWLEY DECISION:
How the Supreme Court Views the Education of Handicapped Children

by

Barbara D. McGarry

"How does a school educate a child who has physical handicaps that prevent him from learning in the way most children do?"

This question, asked in an editorial by the Washington Post newspaper three days after the U.S. Supreme Court handed down its ruling on the landmark Rowley case on June 28, 1982, refers to the Court's interpretation of Congress' intent in enacting "The Education for All Handicapped Children Act of 1975," legislation most often referred to as Public Law 94-142.

Because of the complexity of the law's provisions, it was inevitable that ultimately the Supreme Court would be asked to rule on how much special assistance, under the law, a public school district must make available to a handicapped pupil. Although this is the first case involving P.L. 94-142 that the Supreme Court has agreed to review, there are many more waiting for the chance to be heard, at various levels in the appeals process. The Department of Education has stated that in the 1979-80 school year alone, there were 2,600 hearings and appeals in 49 states, all

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based on parents' objections to some part of their handicapped child's school-based evaluation and proposed individualized educational program. The National School Boards Association, representing embattled local school boards throughout the country, has confirmed that many of these appeals have developed into lawsuits now at the state or district court level.

The question of how much education and related services a handicapped child may receive depends, at least in part, on the financial resources available for this purpose. At the present time, the federal government spends about $1 billion a year to serve more than 4 million handicapped children under the law - but this is about a tenth of the total amount spent, since the states and local school boards provide almost 90 percent of the money spent on handicapped childrens' education, or about $9 billion per year. This averages out to about $2,500 per handicapped student.

In terms of all elementary and secondary pupils in the U.S. public school system, handicapped children now comprise about a tenth of the total enrollment of 40,568,000 students, according to the Statistical Abstract of the United States. In terms of cost, expenditures for handicapped children's public education accounts for about an eighth of the current $86,712,000,000 total spent, with a national average per-pupil expenditure of $2,137. As any homeowning taxpayer knows, the primary source of financial support for the local public school is the local property tax. However, that tax base is suffering severe erosion in most parts of the country, with record unemployment due to massive layoffs, in an economy saddled with interest rates that have caused an unprecedented number of business failures and foreclosures. Documenting this, Dun and Bradstreet, Inc. reported in July 1982 that business bankruptcies in the first six months of 1982 exceeded the total for all of 1980, and were nearly 50 percent more than 1981; altogether, 11,948 businesses went bankrupt in the first half of the year, with 522 failing in the week ending July 1, 1982. In rural areas, the report is no better: the projected net farm income for 1982 is $1 billion less than in the depression year of 1929. With

the number of farmers forced off their land during the depression years of the early 1930's measured in the tens of thousands, the farm foreclosures in the first half of 1982 have been over 1,000 per week. Farmland is declining in value for the first time in 30 years.

"Even the Supreme Court Justices read the newspapers," Justice Oliver Wendell Holmes once observed, during his tenure on the court. Having accepted review of the Rowley case, the present members of the Supreme Court are well aware of the precedent-setting impact of their decision on a national economy struggling to reverse its record-setting deficit. If the court had ruled in favor of increased spending for handicapped children's education, the financial means to accomplish this would have had to come from one or all of three sources: the deficit-ridden federal treasury; the states, all but 3 of which have anti-deficit statutes that are already requiring reduction on some essential services to make ends meet; or county and municipal governments whose property taxing powers are being eroded daily by business failures and mortgage foreclosures.

The resulting court decision was therefore predictable, if somewhat embarrassing in its strained interpretation of limited Congressional intent in P.L. 94-142 and other laws for the education of handicapped children. Indeed, the decision makes only a veiled reference, in a footnote, to "open-ended" expenditures, and then only to chide the three dissenting Justices for equating "appropriate education" with "open-ended." To examine how the majority opinion was reached, it is useful to review briefly the facts of the case itself.

Amy Rowley, a deaf first-grade student at a public school in the Hendrick Hudson Central School District in New York, according to the transcript, has "minimal residual hearing and is an excellent lipreader." Enrolled the previous year in a regular kindergarten, she was tested to see what supplemental services would be necessary for her education. As the transcript states,

> "Several members of the school administration prepared for Amy's arrival by attending a course in sign-language interpretation, and a teletype machine was installed in the principal's office to facilitate communication with her parents who are also deaf..... It was determined...that she should be provided with an FM hearing aid which would amplify words spoken into a wireless receiver by the teacher or fellow students during certain classroom activities."

The following autumn, upon enrolling in first grade, Amy was provided with an Individualized Educational Program (IEP), as required under P.L. 94-142. Her IEP stated that she should continue in a regular classroom, should continue to use the FM hearing aid, and should receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week. Her parents agreed with the IEP, but insisted that Amy also be provided with a qualified sign-language interpreter in all her academic classes, at an estimated cost of $15,000 for the school year. The school administrators, after consulting with the school district's Committee on the Handicapped, Amy's teacher and others familiar with her academic and social progress, denied the request for an interpreter.

Following the appeals procedures prescribed in P.L. 94-142, Amy's parents obtained a hearing before an independent examiner, who concurred with the administrator of the school, after hearing both sides. The parents than appealed to the New York Commissioner on Education, who upheld the previous decisions. Subsequently, pursuant to the law's provision for judicial review, the Rowleys filed suit in U.S. District Court, claiming that failure to provide a sign-language interpreter constituted a denial of the "free appropriate public education" guaranteed by P.L. 94-142.

At the District Court level, Amy's parents won, with that court's decision noting a disparity between Amy's achievement and her potential, leading to the conclusion that she was not receiving a "free appropriate public education," which the court defined as "an opportunity to achieve her full potential commensurate with the opportunity provided to other children."

This decision was then appealed by the Hendrick Hudson School Board to the U.S. Court of Appeals for the Second Circuit, which upheld the District Court's ruling; and was finally appealed to the Supreme Court, which heard the arguments on March 23, 1982, from both sides. Interestingly, the attorney selected by the Rowleys, Michael Chatoff, is also deaf; and as the first deaf attorney ever to participate in Supreme Court proceedings, received special permission to install a video screen on which the Justices' questions were transcribed. Joining in support of the Rowleys' position, a representative of the Justice Department contended that the lower courts had correctly interpreted P.L. 94-142.

During the Supreme Court's hearing, Justice John Paul Stevens asked the question perhaps uppermost in the audience's minds -- "My problem with the case is as soon as you acknowledge some substantive review, what's the stopping point?" Justice Stevens followed this with another question asking the Rowleys' attorney if their interpretation of the law wouldn't require sign-language interpreters for every deaf child in the country. For the Rowleys, attorney Chatoff replied that his client was a special case, since "most deaf children don't attend public schools."

Nothing of financial implications, however, appeared in the Supreme Court's decision issued three months later, except the footnoted reference to "open-ended" authority espoused by the dissenting opinion. Instead, six of the Justices joined in the prevailing opinion by circumscribing the intent of P.L. 94-142 in a manner calculated to frustrate and astonish the Congressional drafters of the legislation, let alone the many organizations that have supported it from its inception.

Addressing itself to the primary task of redefining "free appropriate public education" under P.L. 94-142, the majority decision is as follows:

> "The Act's requirement of a 'free appropriate public education' is satisfied when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate grade levels used in the State's regular education, and must comport with the child's IEP, as formulated in accordance with the Act's requirements. If the child is being educated

> in regular classrooms, as here, the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade....The Act's legislative history shows that Congress sought to make public education available to handicapped children, but did not intend to impose upon the States any greater substantive educational standard than is necessary to make such access to public education meaningful....[Congress] did not intend to achieve strict equality of opportunity or services for handicapped and nonhandicapped children, but rather sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education. The Act does not require a State to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children...."

Then, in language clearly intended to discourage secondary appeals, the ruling cautions:

> "In suits brought under the Act's judicial-review provisions, a court must first determine whether the State has complied with the statutory procedures, and must then determine whether the individualized program developed through such procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress, and the courts can require no more."

Even while joining in the majority opinion, Justice Blackmun's separate opinion reads almost like a dissent:

> "Although I reach the same result as the Court does today, I read the legislative history and goals of the Education for All Handicapped Children Act differently. Congress unambiguously stated that it intended to 'take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity.' S. Rep. 94-168, p. 9 (1975)...the question is whether Amy's program, viewed as a whole, offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her non-handicapped classmates. This is a standard predicated on equal educational opportunity and equal access to the educational process...."

Targeting in on the question of how to define an "appropriate" education, dissenting Justices White, Brennan, and Marshall equate it with "equal educational opportunity," by citing the 1975 speeches of Senators Randolph, Humphrey, Beall, Stafford, Taft, and Williams, as well as Representatives Brademas, Cornell, Grassley, Perkins, and Mink. In addition, the dissent cites the legislation's accompanying

report (H. Rpt. 94-332) which describes the purpose of a child's IEP as "to enable the child to achieve his or her maximum potential."

With all the clarity of 20-20 hindsight, one may wonder if there might not have been a better test-case for reviewing P.L. 94-142. Certainly the affluent district in which Amy Rowley's school is located can hardly be viewed as typical. Given the situation of the national economy, however, many hard-pressed school boards are breathing more easily after the Rowley decision. Also, the current Congress is let off the hook in an election year, although the law specifies that Congress may allocate up to "Forty per centum, for the fiscal year ending September 30, 1982, and for each fiscal year thereafter, of the average per pupil expenditure in public elementary and secondary schools in the United States" in state grants for educating handicapped children.

A faint clue as to further challenges that might be offered is provided in the majority opinion on Rowley. The words" reasonably calculated" with reference to a child's IEP, and "access to public education" both would seem to refer to judicial dicta on "reasonable accommodation." Whether such challenges could be undertaken in the context of P.L. 94-142, or Section 504 (forbidding discrimination against the handicapped) of the Rehabilitation Act, is a question not to be lightly undertaken. Recent Court decisions based on Section 504, such as Davis (Southeastern Community College v. Davis, 47 U.S.L.W 4689, June 11, '79) or Trageser (Trageser v. Libbie Rehabilitation Center Inc., 590 F. 2nd 87, 4th Cir. 1978, cert. den. 47 U.S.L.W), leave small hope for success in a further test. Also, as might have been anticipated, the majority decision cites the 1975 Rodriguez ruling in dismissing "equal protection" challenges (San Antonio School District v. Rodriguez, 411 U.S. 1, 1975).

With regard to Congressional action, increasingly constrained by cutbacks mandated in the "reconciliation" provisions of Congressional Budget Resolutions, one hears fewer oratorical flourishes on "reordering our priorities." Until the national economic picture brightens, many admirable domestic programs will share the limited outlook prescribed by the Rowley decision, for the same reason, even if unarticulated.

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